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Leiden  
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## **The mind in the courtroom: on forensic mental health reports in judicial decision-making about guilt and sentencing in the Netherlands**

Es, R.M.S. van

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## Opening the black box of judicial decision-making in Dutch cases with forensic mental health reports

A qualitative study

### ABSTRACT

Forensic mental health reports (FMHRs) can be informative regarding criminal responsibility, risk assessment and treatment options, but are formally irrelevant for decisions about guilt (in terms of *actus reus*). In the Netherlands, a criminal trial is not bifurcated into a guilt and sentencing phase. Consequently, the court has the FMHR in the case file before the trial starts. Important gaps remain in our understanding of the judicial decision-making process in cases with FMHRs. In five focus groups, 17 judges were interviewed about how expert information in FMHRs plays a role in their decision-making about guilt and sentencing. Using thematic analysis, results showed that evaluation of recidivism risk is influential in decisions about treatment. Conclusions about criminal responsibility inform decisions about the prison sentence length. Although not used deliberately, judges could not rule out that an FMHR contributes to their conviction of guilt. Implications for research and practice are discussed.

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## 5.1 INTRODUCTION

Mental disorders are overrepresented among individuals in the criminal justice system (Dirkzwager et al., 2021; Dorn et al., 2014; Favril & Dirkzwager, 2019; Fazel & Danesh, 2002; Fazel et al., 2016). Crimes can be committed under the influence of a mental disorder. Therefore, forensic mental health reports (FMHRs) are an important source of information for judicial decision-makers. In the Netherlands both judges and prosecutors can request a forensic mental health evaluation. Such pre-trial evaluations inform the court and the public prosecution office about the presence of a mental disorder and whether this disorder is associated with the behavior and decision-making of the defendant at the time of the offense. The report also contains a risk assessment of whether and how the disorder might affect future (criminal) behavior. The forensic mental health evaluation is based on biographical information, statements about the alleged offense(s), health and addiction histories, forensic psychological/psychiatric assessments including psychological testing and on social network analyses. When the evaluation takes place in a forensic observation clinic (instead of on an outpatient basis), the report also contains information from (group) observations. Based on the evaluation, conclusions are drawn about criminal responsibility and risk, and advice is given on treatment options with appropriate regulations (Hummelen & Van der Wolf, 2018; Koenraadt, 2010; Van Marle et al., 2013). In most cases (between 86% and 90%) judges decide in line with the expert advice about criminal responsibility and treatment options in these FMHRs (Boonekamp et al., 2008; Harte et al., 2005; Nagtegaal et al., 2018). However, Dutch judges have considerable discretionary power when determining appropriate sanctions, especially in cases when an FMHR is involved. The law does not prescribe how information from an FMHR should be used in judicial decisions. As such, the Netherlands presents an informative case to understand how judges use this discretion in cases with forensic mental health information.

An FMHR in a criminal case can have far reaching consequences for the defendant. When a mental disorder is present, and the defendant poses a significant danger to society, it is possible to impose a TBS measure (*terbeschikkingstelling* in Dutch): (involuntary) commitment to a high security forensic psychiatric hospital (section 37a, 37b and section 38 CC). TBS has two variations: TBS with conditions (section 38 CC) and TBS with forced care (section 37b CC). When a TBS measure with conditions is imposed, the offender has to abide to specific treatment conditions without being forced to receive care. A more invasive option is a TBS measure with forced care. The offender is placed in a (maximum) secured forensic psychiatric treatment facility to be treated for mental illness for (at least) two years. The measure can be repeatedly extended with one- or two-year increments in the case of very serious index offences (sections 38d sub 2 and 38e sub 1 CC). A TBS measure can be imposed either without or in combination with a prison sentence.

Hence, an FMHR is relevant in decisions about sentencing, which is confirmed by limited research using case analysis and experimental vignette studies among students (e.g. Claessen & De Vocht, 2012; see the review in Chapter 2). Some studies further suggest that an FMHR may even have an unwarranted effect on legal decisions about guilt in the Netherlands, although research on this unintentional effect among professional judges is scarce (see Chapter 3; Rassin, 2017b; Van Es et al., 2020). The current study is aimed to understand how judges use information from an FMHR in their decisions in a criminal trial and what information in FMHRs is considered particularly important.

### 5.1.1 Forensic mental health evaluation at trial

In the Netherlands, prior to trial the judges receive a case file containing all information collected during the pre-trial phase. This information includes the FMHR(s). In the Netherlands decisions about guilt, criminal responsibility and sentencing are all discussed in a single-phase trial. Serious offenses (i.e. an offense which is punishable by at least 12 months of imprisonment) are tried by panels of three professional judges. The court first determines the question whether the alleged behavior was committed by the defendant. Second, it is determined whether the conduct constitutes a criminal act. Then the court proceeds to determine whether the defendant is blameworthy and therefore criminally responsible. Finally, the court decides on the appropriate sanctions, which can consist of punishment (e.g. a prison sentence) and/or additional measures (e.g. TBS measure) (section 350 CCP; Keiler et al., 2017). Both prosecution and defense can appeal these decisions at a court of appeal in which three justices try the case.

#### 5.1.1.1 Decision-making about guilt

Information about mental health in an FMHR is not relevant as evidence to determine guilt (in terms of *actus reus*: act or omission that make up physical elements of the crime) of the defendant. Although not prohibited by law, guidelines for forensic mental health experts caution that information from an FMHR should not contribute to the evidence against the defendant and decision-making about guilt (Beukers, 2011; Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022; Nederlandse Vereniging voor Psychiatrie, 2013). Contrary to the Dutch criminal procedure, in some jurisdictions the criminal trial is bifurcated into a guilt and a sentencing phase to prevent irrelevant information from being used in decisions about guilt. However, the structure of the Dutch criminal procedure, means *a priori* exposure to all information in the casefile relevant to make decisions about guilt, criminal responsibility, and sanctions. Moreover, judges hold substantial discretionary

power in the evaluation and combination of available evidence (Dubelaar, 2014). From a psychological perspective on decision-making it can be argued that the structure of the criminal procedure may elicit cognitive biases in favor of a guilty verdict in cases in which guilt may be doubtful (Bodenhause & Lichtenstein, 1987; Charman et al., 2019; Epstein, 1994; Gunnell & Ceci, 2010; Kalven & Zeisel, 1966; Tversky & Kahneman, 1974). Theories which propose that evidence is evaluated in a holistic manner (e.g. Pennington & Hastie, 1992; Pennington & Hastie, 1993; Simon, 2004), suggest that information about mental health of a defendant in an FMHR can, by providing context, affect the evaluation and integration of available evidence (see Neal & Grisso, 2014; Rassin, 2017b, 2020). This might be especially the case if the disorder provides a plausible explanation for the crime (e.g. a disorder that may explain sudden aggressive behavior when suspected of a violent crime; Berryessa & Wohlstetter, 2019; Mossière & Maeder, 2015). Under such circumstances, this information can be prejudicial and bias decisions towards a guilty verdict. Despite a few (explorative) quantitative studies suggesting such an unintentional effect (see Chapter 3; Mowle et al., 2016; Rassin, 2017b; Van Es et al., 2020), it remains unclear *how* information from an FMHR can have a role in the decision-making process regarding decisions about guilt and whether decision-makers are actually aware that unwarranted effects can occur.

#### 5.1.1.2 *Decision-making regarding sentencing decisions*

With respect to sentencing decisions, the FMHR can be informative regarding criminal responsibility, risk assessment and treatment options (i.e. measures). Contrary to many other legal systems, criminal responsibility in the Netherlands is not dealt with as a binary construct (i.e. the defendant is considered either responsible or not guilty by reason of insanity), but rather on a scale. Up until recently five degrees of criminal responsibility were used. Currently only three degrees are used (full responsibility, diminished responsibility, no responsibility) (Nederlandse Vereniging voor Psychiatrie, 2013). Conclusions about criminal responsibility and assessment of risk entail information on two important factors in sentencing decisions: blameworthiness of the offender and dangerousness of the offender related to community protection (Berryessa, 2018; Steffensmeier et al., 1998). On the one hand, diminished criminal responsibility can lead to a milder sentence, most likely a shorter prison sentence. On the other hand, high recidivism risk may be used to justify longer incapacitation of the offender in order to protect society. In such situations, Dutch legislation allows judges to combine punishments with measures, such as TBS. In practice, punishment (e.g. a prison sentence) is then considered proportionate to the severity of the offense and to the blameworthiness of the defendant, whereas the additional measure is used to protect society. Measures do not need to be proportional to severity and blameworthiness because they are not intended to be punitive and inflict suffering. Therefore measures can

easily exceed what is considered proportional from a retributive perspective (De Keijser, 2000; De Keijser, 2011; Hart, 2008; Steffensmeier et al., 1998; Von Hirsch, 2009). Empirical research on the decision-making process regarding sentencing by professional judges in cases with FMHRs is, however, scarce. In the Dutch context specifically, explorative case analysis showed that conclusions about diminished responsibility can indeed mitigate the length of a prison sentence, but the magnitude of this mitigation is unclear (Claessen & De Vocht, 2012). Furthermore, other case factors (e.g. circumstance and severity of the crime) can affect this mitigation. Consequently, it remains unknown *how* judges incorporate information from an FMHR and other case factors in their decision-making process regarding sentencing in the Netherlands.

### 5.1.2 The current study

While a few (quantitative) studies have focused on the role of FMHRs in decisions about guilt and sentencing (see Chapters 2, 3 and 4), important gaps remain in our understanding of the decision-making process in cases with FMHRs. Moreover, most prior research used mock jurors or students to study these decisions (see Chapters 2, 3 and 4), while in practice professional judges decide on appropriate sentences and, in most civil law systems, on decisions about guilt. This study aims to provide an in-depth qualitative account of the extent and the manner in which information in FMHRs play a role in judicial decision-making about guilt, punishment and (TBS) measures in Dutch criminal proceedings. While specifically studied in the Dutch context, the current study also provides a more general insight in factors relevant in the judicial decision-making process in cases with forensic mental health information. To address these topics, we interviewed 17 judges in five focus groups about their decision-making regarding guilt and sentencing and the specific aspects of a forensic mental health evaluation (i.e. the report and the experts) judges find important to inform their decisions. The methodology in this study is described in paragraph 5.2. Paragraph 5.3 reports the results from the focus groups before these are discussed in paragraph 5.4.

## 5.2 METHOD

### 5.2.1 Focus group design

The current study used focus groups to allow interaction and discussion about the participants' experiences with and views on FMHRs. Using the digital audiovisual communication platform Microsoft Teams, five focus groups were held with a total of 17 professional judges. The discussions had an average

length of 78 minutes. Data saturation was reached after the fourth session. The groups consisted of 3 or 4 participants, with the exception of one in which only two judges participated due to last minute attrition (see Table 5.1). In-person focus groups usually require a minimum of 4 participants (Krueger & Casey, 2000). However, for online focus groups using audiovisual conference technology, it is recommended to assign fewer participants to each group to optimize interaction among participants and to ensure manageability of the conversations (Dos Santos Marques et al., 2021; Krueger & Casey, 2015). Furthermore, professionals tend to contribute more freely to a focus group, so a smaller group is preferred when conducting focus groups with professionals (Finch & Lewis, 2003; Tuttas, 2015). Purposive sampling was used to ensure homogeneity of the groups. Participants were required to have experience as a criminal law judge in panels of three judges at a district court or court of appeal. To optimize heterogeneity in experiences and perspectives in each focus group, experience with FMHRs was not a sampling criterion. The moderator (first author) engaged the participants in active discussion and notes were taken by a research assistant.

## 5.2.2 Procedure

This study was approved by the Dutch Council for the Judiciary and the Committee of Data and Ethics of Leiden Law School. The first author signed a confidentiality agreement with the Council about the processing and use of collected data. After permission was obtained by the Council of the Judiciary, participants were recruited by the National Consultation of Criminal Law (NCCL; in Dutch: *Landelijk Overleg Vakinhoud Strafrecht*) and the personal networks of the researchers. A recruitment message containing information about the purpose and design of the study was distributed among criminal law judges by the NCCL. When participants were interested, their contact information was shared with the first author and the focus group was scheduled via e-mail. Participants were assigned to a group based on agenda availability. In three out of five groups, at least two participants knew each other professionally.

All participants signed a consent form after being informed about the content and purpose of the study, their rights regarding their participation, audio- and videorecording of the conversation and protection of their privacy and data. This consent was also verbally confirmed before recording started. No incentives for participation were given. All focus groups were conducted in Dutch and recorded with audio and video in Microsoft Teams as well as with a remote audio recorder. The focus groups were held between April 2021 and June 2021.

A semi-structured interview protocol with open-ended questions was used as topic guide to allow participants to discuss how they approach an FMHR,

which aspects of the FMHR they find most important and how they use the information in an FMHR in their decision-making process (e.g. ‘for which decisions do you use information from an FMHR?’; ‘in what manner does an FMHR contribute to sentencing decisions?’; ‘to what extent does criminal responsibility or recidivism risk play a role in sentencing decisions?’; ‘to what extent do you think that information in an FMHR contributes to decisions about guilt?’) (see Appendix C). Follow-up questions were used to prompt and stimulate discussion. The topic guide was tested in a pilot session with five deputy judges. Data were anonymized during transcription and were stored and accessed according to the university’s Code of Conduct and the General Data Protection Regulation. After analysis, participants were able to check the results for any factual inaccuracies.

### 5.2.3 Participants

A total of 17 judges from different districts participated in five focus groups. Table 5.1 shows the distribution of participants and relevant demographics across the five groups. Seven judges (41.2%) from district courts and ten justices from courts of appeal (58.8%) participated. There was an even distribution of male and female participants (52.9% male). Experience as a criminal law judge ranged from 6 months to over 20 years. Participants with less experience as a judge had prior (long) experiences as a criminal lawyer or prosecutor. Two participants had recently retired. All participants had previous experience with FMHRs at trial and about half of the participants ( $n = 8$ ) mentioned they had other relevant (prior) occupations related to FMHRs or forensic psychiatry, or that they specialized in court hearings regarding extensions of involuntary commitment to forensic psychiatric hospitals or the recently introduced Forensic Care Act.<sup>1</sup>

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1 The Forensic Care Act provides judges with the possibility to divert defendants out of the criminal justice system into civil mental health care.



Table 5.1: Participants per focus group

	Participants
FG 1 (n = 4)	<ul style="list-style-type: none"> <li>· R1, court of appeal, female</li> <li>· R2, court of appeal, female</li> <li>· R3, district court, male</li> <li>· R4, district court, female</li> </ul>
FG 2 (n = 2)	<ul style="list-style-type: none"> <li>· R1, district court, male</li> <li>· R2, district court, male</li> </ul>
FG 3 (n = 4)	<ul style="list-style-type: none"> <li>· R1, court of appeal, male</li> <li>· R2, court of appeal, male</li> <li>· R3, district court, female</li> <li>· R4, district court, female</li> </ul>
FG 4 (n = 3)	<ul style="list-style-type: none"> <li>· R1, court of appeal, female</li> <li>· R2, court of appeal, male</li> <li>· R3, district court, male</li> </ul>
FG 5 (n = 4)	<ul style="list-style-type: none"> <li>· R1, court of appeal, female</li> <li>· R2, court of appeal, male</li> <li>· R3, court of appeal, male</li> <li>· R4, district court, female</li> </ul>

Note. FG = focus group; R = respondent. These abbreviations are also used to reference the quotations.

#### 5.2.4 Data coding and analysis

The discussions were transcribed by the first author using the computer-assisted qualitative analysis tool ATLAS.ti (ATLAS.ti Scientific Software Development GmbH 9). Transcripts were coded using a hybrid approach (Fereday & Muir-Cochrane, 2006) of data-driven inductive coding (Boyatzis, 1998) and a more deductive approach based on prior research and theory (Crabtree & Miller, 1999). Data were coded in three stages: open, axial and selective coding (Strauss & Corbin, 1998). Codes were grouped into categories and analyzed using a thematic approach to identify patterns within the data (Braun & Clarke, 2006; Nowell et al., 2017). Important themes that emerged were the specific sources of information in a case with an FMHR (i.e. the case file, the FMHR, expert testimony), the need for information about specific attributes (i.e. criminal responsibility, dangerousness) and the use of information in specific decisions (i.e. guilt, prison sentence and TBS). The research assistant independently coded 20% of the data using a protocol of codes and themes to check the validity of the themes. Any discrepancies were resolved in a consensus meeting.

In what follows, we outline the results from the focus groups. First, we describe how judges generally approach an FMHR in a case (paragraph 5.3.1).

Then paragraph 5.3.2 discusses if and how information in an FMHR contributes to decisions about guilt. Paragraph 5.3.3 discusses the decision-making regarding sentencing. In paragraph 5.3.3.1 the evaluation of dangerousness of the offender is discussed and how this specifically contributes to imposition of the TBS measure. In this regard the role of the forensic mental health expert at trial is also discussed. Paragraph 5.3.3.2 describes the evaluation of criminal responsibility and how this contributes to decisions about appropriate punishment (also in combination with TBS).

### 5.3 RESULTS

#### 5.3.1 General approach of an FMHR

To explore the manner in which judges generally use FMHRs in their decision-making, they discussed the (expert) information they can receive about a defendant and how they approach the expert information in a case file. On the one hand, all judges expressed that they usually read the full FMHR carefully and critically. On the other hand, the volume of most reports is quite large due to a lot of repetition. Since judges experience a lot of time constraints in their profession, this sometimes encourages judges to selectively read the report to search for the information they need. There was a lot of variety in aspects in the report that they choose to read (carefully), and consider important for their decisions, such as information about a defendant's childhood, the relation between disorder and behavior, psychological tests, and treatment history. Interestingly, some aspects were considered to be very important by some judges, while others regarded the same aspects as less or least informative (i.e. information about early childhood). In general, they agreed that the quality of FMHRs is usually good and has certainly improved over the years. In this regard, judges also discussed how perceived quality of the report affects interpretation of its content. When the conclusions and advice follow logically from the report, most judges adopt the conclusions and advice in the FMHR more easily. Finally, the experience of the reporting experts appears to be important for judges to evaluate the validity and credibility of the report. This assessment was specifically mentioned when a case involves counter-expertise. All judges agree that information about the diagnosis of the disorder and how this relates to conclusions about criminal responsibility and risk is important for their decisions. We more elaborately discuss how these concepts contribute to their decision-making process regarding sentencing in the paragraphs that follow (see Figure 5.1 for an overview of key findings).

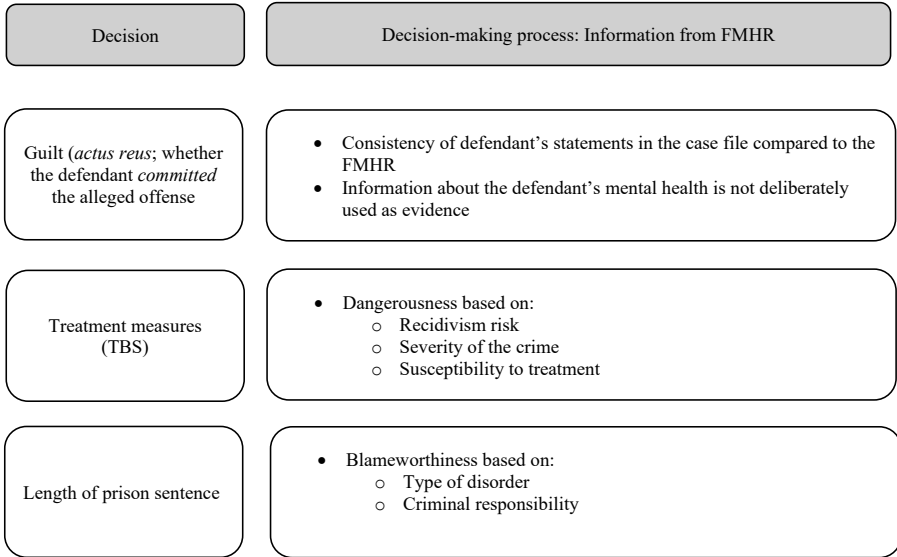


Figure 5.1: Visualization of key findings

### 5.3.2 Decision-making regarding guilt

The decision whether the defendant committed the alleged offense is the first decision which judges have to make in a trial. Strictly speaking, information about the mental health of a defendant in an FMHR is irrelevant for such decisions (in terms of *actus reus*: act or omission that make up physical elements of the crime). The majority of judges indeed did not promptly mention the FMHR in association with decisions about guilt. A number of judges did mention that they check the interview by the psychologist and/or psychiatrist about the offense for discrepancies with the defendant’s statements during the police interviews. If major discrepancies are noticed, judges may confront the defendant at trial with these discrepancies. In such situations information in an FMHR is used as a starting point for further questioning about the offense during trial.

Participants were also asked to reflect on prior research (e.g. Chapter 3, Van Es et al., 2020), which showed that information about mental health in an FMHR biased decisions towards a guilty verdict. Judges unanimously expressed that they do not deliberately use information about the defendant’s mental health from the FMHR as evidence:

‘No, I cannot really imagine that. It is just like R1 said, maybe it creates the impression of a dangerous man and that can be important when you believe there are indications for a measure. But for the allegations, yes then you really focus on the

evidence and if the evidence is not there, it is unfortunate if the man is dangerous. You sometimes acquit someone who you think is very dangerous. I do not believe that that influences your conviction. I have never experienced that' [FG 1, R4].

Judges believe that their professionalism and the manner in which the Dutch criminal procedure is structured, protect them against biases in their decision-making. When they study the case file prior to the trial, most judges claim to adhere to the order in which they have to make the specific decisions about guilt, criminal responsibility and sentencing (as dictated by section 350 of the CCP).<sup>2</sup> Therefore, they usually start with the evidence and circumstances of the offense before continuing with the personal circumstances of the offender and thus the FMHR. A number of judges mentioned that strictly adhering to this order, helps them to approach each case unbiased and with an open mind. Moreover, the FMHR is often added to the case file later on: 'You usually receive that at the last minute and then you have already reviewed the case file and established a judgement, more or less, independently, about how to proceed' [FG 1, R1].

The order in which the case file is read is thus important for understanding judges' appraisal of whether information about a mental disorder in a defendant can potentially bias evaluation of evidence and decisions about guilt. Judges could imagine that such information in an FMHR might subconsciously contribute to their evaluations of evidence and other aspects of the case:

'I can imagine when you conduct such a study [*experimental vignette study, RvE*] among professional judges, especially when a mental disorder is congruent with the allegation, [R1 nods] that it provides a final push for the conviction even though this is completely subconscious. I think that applies to us as well.' R1: "I do not rule it out no" [FG 3, R3/R1].

This mechanism was further illustrated by a number of fictitious examples they came up with in which such an effect could occur. For example, a case with limited evidence, no criminal record and a mental disorder which provides a plausible explanation for the offense. These examples bear similarities with case vignettes used in prior experimental research on this effect (see Chapter 3, Van Es et al., 2020; Rassin, 2017b):

'Well, I was thinking of an example in which someone is suspected of stalking and denies. There is not much more than the police report. If you have an FMHR that concludes that the defendant has abandonment issues and a compulsive disorder

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2 Section 350 CCP, states that the court deliberates, on the basis of the indictment and the hearing at trial, on the question whether it has been proven that the defendant committed the criminal offense, and, if so, which criminal offense the judicial finding of fact constitutes under the law. If the offense is punishable and the defendant criminally responsible, punishment or measure shall be imposed.

or something like that, then I think this may play a small part in your conviction and consequently the evaluation of the evidence' [FG 5, R3].

### 5.3.3 Decision-making regarding sentencing

Conclusions about criminal responsibility and assessment of risk in an FMHR informed judges in the current study about two important factors in sentencing decisions: blameworthiness of the offender and dangerousness of the offender related to community protection. More specifically, judges discussed how certain case and offender factors as presented in the FMHR contribute to their evaluation of dangerousness, which plays a role in decisions about treatment measures. Furthermore, they discussed how certain case factors contribute to their evaluation of blameworthiness, which plays a role in decisions about punishment (whether or not in combination with treatment measures).

#### 5.3.3.1 *The role of offender dangerousness in decisions about treatment measures*

The case factors judges deem useful in their evaluation of dangerousness are the risk assessment in an FMHR and the severity of the crime. In general, these factors, and the role they play in the evaluation of dangerousness, are taken into account when deciding about treatment measures. Susceptibility to treatment to reduce risk, is also a factor that is taken into consideration when judges decide on appropriate treatment measures. Several judges believed that some disorders are not suitable for ambulatory treatment:

'And I think that you will always have a small group of individuals who you'd rather keep from society for safety reasons. Such as persistent pedophiles; that is also a disorder that will never go away. [R1 and R2 nod in agreement.] And when that disorder leads to violent behavior, you cannot take that risk' [R2 nods] [FG 1, R4].

When an offender poses a significant danger to society, a TBS measure is usually considered the most suitable sanction. Offenders often experience TBS as a severe and invasive sanction. For most serious offenses, TBS with forced care can be repeatedly extended with one- or two-year increments (sections 38d sub 2 and 38e sub 1 CC). Judges are aware of this potential indefinite deprivation of liberty. Such incapacitation is understandably deemed necessary in cases with dangerous offenders. However, judges expressed, both explicitly and implicitly, that principles of proportionality and subsidiarity of the measure are considered when deciding to impose TBS, especially when the offense is less severe but still qualifies as a TBS-worthy crime:

'I think that for example a less severe index offense can be a reason to refrain from imposing TBS [*with forced care, RvE*]. Because of the uncertain perspective that

someone is possibly ‘detained’ for an extended period, maybe his entire life. [R4 shakes her head] For some offenses, you can question whether the offense justifies [R4 motions a balancing act] that prospect. [R4 nods]. Even if there is an advice to impose a TBS measure’ [FG 5, R2].

Yet, sometimes judges experience practical constraints when they want to take principles of proportionality and subsidiarity into consideration when deciding between TBS with forced care or with conditions. Such constraints can be a lack of cooperation between other actors in the criminal justice system when judges contemplate less severe treatment options. For example, the option of TBS with conditions instead of forced care is only possible with support from the probation service, because they are responsible for monitoring and control (sections 68-71 Regulation for care for TBS patients). If the probation service disapproves this option, TBS with forced care often remains the only option. Such situations prompt summoning experts to testify in court.

While judges unanimously agreed that experts should be summoned to court more often, experts rarely testify in court in the Netherlands. A practical explanation for this was that an FMHR is often added at a late stage to the case file. Therefore, there often is no time to request the expert to testify in court. Judges also unanimously agreed that testimony by the expert is very valuable to clarify the findings in a report, to critically evaluate the information and ask questions that arise during trial.

#### *5.3.3.2 The role of criminal responsibility in decisions about prison sentences*

The extent to which experts consider an offender criminally responsible for the offense, informs judges whether he is punishable, and if so what the appropriate severity of this punishment should be. Judges discussed several factors, both in the FMHR and other aspects in a case, that influence the decision-making about the appropriate punishment, in most cases a prison sentence.

Judges use the conclusions about criminal responsibility in FMHRs to inform and establish their own evaluation of criminal responsibility. When judges decide that criminal responsibility is diminished, this generally mitigates the prison sentence because they argue that less punishment is deserved. As said, currently criminal responsibility is assessed in three degrees: no responsibility, diminished responsibility, full responsibility. Multiple judges in different discussions expressed that this scale makes it difficult to accurately determine the extent to which the mental disorder affected the behavior of the defendant. They expressed that they prefer the use of the scale of five degrees of responsibility (i.e. no responsibility, severe diminished responsibility, diminished responsibility, slight diminished responsibility, full responsibility) that was used in the past. According to them, the reduction of degrees makes it difficult to decide how a broad category of ‘diminished responsibility’ can be translated into the prison sentence:

‘Well.... I realized that we recently moved from five degrees to three degrees. And I find that an impoverishment of the reports. Especially concerning the question about the extent to which it [*criminal responsibility, RvE*] should affect sentencing. [R4 nods] It may be less of a problem when a TBS measure is also imposed, but whether someone is strongly diminished responsible or slightly diminished responsible, is very relevant when you determine the length of a prison sentence. It is currently very black and white, so I do miss those five degrees’ [FG 5, R2].

Furthermore, judges mentioned that sometimes specific types of disorders can affect evaluation of criminal responsibility and thus the extent to which it mitigates the prison sentence. A few judges claimed that it is only meaningful to know *whether* a disorder was present at the time of the offense. Others, usually with more experience with cases with FMHRs, expressed that certain disorders (e.g. psychotic disorders) impair criminal responsibility more than others (e.g. personality disorders). They also look at the congruency between the criminal behavior and the disorder more specifically:

‘I mean, another example: there was someone with an intellectual disability, at least that was what the tests concluded. At the same time, the offense was a very complicated extortion. And not once, but twice. So we thought: you need to be a very smart guy to pull that off. And when the conclusions state intellectual disability and slightly diminished responsibility, you start asking questions about how those things align. When someone with an IQ of below, far below 70, comes up with a very complicated scheme... Yes, well those are all questions that arise and that you pose’ [FG 2, R1].

Even within some specific disorders, more specifically substance abuse, the extent to which such a disorder could diminish criminal responsibility was addressed differently by the respondents. Similar to the scholarly debate about whether substance abuse is considered a disorder that can impair criminal responsibility (see e.g. Goldberg, 2022; Kennett et al., 2015; Morse, 2013), some said that the contribution of substance use to the offense does not diminish criminal responsibility because of the principle of prior fault (*culpa in causa*). Others argued that substance abuse is classified as a disorder by experts in the FMHR and the DSM-5 (American Psychiatric Association, 2013). Therefore they should also view it as a disorder that can diminish criminal responsibility:

‘You sometimes encounter, for example with an addiction, that other factors, such as moral judgment, affect the legal judgement about responsibility. To what extent can you expect that someone asks for help [*with addiction, RvE*]? [R2 and R4 nod.] This can create tension with behavioral experts who have done more research over the years on how addiction works, also biologically. But that does not mean that this is weighted heavily in legal decisions about responsibility. [R2 and R4 nod.] So in that case, the type of disorder matters’ [FG 1, R3].

An additional factor that can mitigate a prison sentence is the urgency with which an offender needs to be treated for mental health problems according to the experts. Such considerations are relevant in case a prison sentence is combined with a treatment measure such as TBS. In the Netherlands a prison sentence is executed before the TBS measure commences. If the court concludes that the offender urgently needs to be treated, this will mitigate the length of the prison sentence when combined with TBS:

‘I have been involved as chair in a case in which a prison sentence of 4 years and TBS was imposed for homicide. Because we agreed that treatment was needed so urgently that we should not wait too long. And you risk that the prosecutor appeals your decisions. But when you explain it correctly, the prosecutor won’t appeal. But you have to realize that such a decision is sometimes necessary and needs to be made’ [FG 4, R3].

Because a TBS measure with forced care can be extended repeatedly, an offender can remain in custody for a long period after the prison sentence has been executed. This was sometimes mentioned as a reason to reduce a prison sentence when combined with TBS. However, a number of judges remarked other aspects in a case that can trump this mitigation. In severe cases in which a prison sentence is combined with TBS, the prison sentence is explicitly intended as retribution for the offense. ‘No, I think that especially with severe offenses, the length of a prison sentence generally functions as a justification to society [R2 nods: “Yes”] The potential length of TBS does not play a large role in such cases, I think’ [FG 3, R3].

#### 5.4 DISCUSSION

This study aimed to provide an in-depth qualitative account of the manner in which information in FMHRs plays a role in judicial decision-making about guilt and sentencing. To address this, 17 Dutch judges were interviewed in five focus groups about their decision-making process and the specific aspects of a forensic mental health evaluation (i.e. the report and the experts) they find important to inform their decisions. This study is one of the first to gain a deeper understanding of judicial decision-making processes in the Netherlands in cases with an FMHR using an ecologically valid sample (but see Van Spaendonck, 2021 for a qualitative study on TBS extension decisions by the court). Such insight enriches the (scarce) prior quantitative research on the effects of FMHRs on judicial decisions with convenience samples (e.g. students). This study also more generally contributes to the knowledge base about decision-making in criminal law, since empirical research on decision-making among professional judges in criminal law is still quite scarce.

Results showed that judges claim to not consciously use information from the FMHR in decisions about guilt (in terms of *actus reus*). They believe that



their professionalism and the order in which they approach a case file protects them against such biases. However, it is also possible that they have a blind spot and do not recognize their own vulnerability to cognitive bias (Pronin et al., 2002). This blind spot has indeed been found in samples of forensic mental health professionals (Kukucka et al., 2017; Neal & Brodsky, 2016; Zapf et al., 2018; Zappala et al., 2017). Introspection about cognitive processes is very difficult (Dhimi & Belton, 2017; Nisbett & Wilson, 1977). Nonetheless, they admitted they could not rule out that information in an FMHR may provide an unintended “extra push” in their conviction in complex cases with limited evidence. This reflection is in line with findings from prior experimental vignette studies which demonstrated that information about the mental health of defendants increased the likelihood of a guilty verdict (see Chapter 3; Rassin, 2017b; Van Es et al., 2020). Consequently, while such information is supposedly not used deliberately, awareness and education about cognitive bias in (legal) decision-making remains necessary. Especially since no legal regulations are in place to explicitly prohibit or prevent any effects of an FMHR on decisions about guilt.

While information from an FMHR about the mental health of a defendant is not deliberately used in decisions about guilt, a number of judges mentioned that they sometimes use the conversation between the experts and the defendant about the alleged offense in the FMHR to check for any discrepancies with the police interview. If such discrepancies are noticed, they will confront the defendant at trial. As such, the FMHR can be used as an anchor point to question the defendant about the offense during trial and can thus contribute to the evidence in a case (see section 339 CCP). This particular use of information from an FMHR is debatable for a number of reasons. On the one hand, prior to evaluation, the defendant is instructed by the forensic mental health experts that all information they gather is added to the case file and thus available to the judges. A conversation with the defendant about the offense is an essential part of the mental health evaluation to establish motives, emotions and behavior at the time of the offense. A defendant also has the right to read the FMHR before it is sent to the court. Therefore, he knows which information is in the FMHR and presented to the court (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022). On the other hand, the Supreme Court decided that information about the offense in reports purposed to inform the court about personal circumstances of the defendants, may not be used as evidence in decisions about guilt (Supreme Court, 18 September 2007, ECLI:NL:HR:2007:BA3610). The conversation between the experts and the defendant about the offense does not serve investigative purposes and is thus not protected by the same legal rights as an official police interview. For example, the expert has the discretion to decide whether the lawyer is permitted to be present during the evaluation and whether audio recording is allowed when requested by the defendant (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022). Also, an expert is not a trained police

investigator. Yet guidelines for forensic mental health evaluation encourage the expert to be critical of the defendant's statement and confront him with discrepancies with his statements during the police interview or statements provided by victims (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022). This will make it difficult for judges to assess the reliability of statements about the offense in an FMHR. However, when the defendant is confronted with his statements during trial and decides to answer, these answers can be used as evidence. Therefore, experts should be aware of the potential impact of such information in an FMHR and lawyers should also critically monitor this process.

With regard to the decision-making process about punishment and measures, evaluation of dangerousness and criminal responsibility of the offender seems to play an important role. Judges argued that high recidivism risk is the most important factor when imposing TBS in cases in which the defendant suffers from a mental disorder. The type of mental disorder is less important in this consideration but can provide some insight into the contribution of the disorder to recidivism risk and how successful treatment can be in limiting this risk. These findings are in contrast with results from an (explorative) experimental vignette study among students who imposed TBS significantly more often when the offenders suffered from schizophrenia than when he suffered from an antisocial personality disorder (see Chapter 4). This discrepancy suggests that professional judges evaluate information about a specific mental disorder differently than students. Judges are also aware of the severity of a TBS measure and therefore apply principles of proportionality and subsidiarity. This decision-making process (partially) resembles the decision-making process in TBS-extension hearings (cf. Van Spaendonck, 2021).

In the decision-making process about the appropriate length of a prison sentence, the evaluation of criminal responsibility is an important factor. The prison sentence can be mitigated by the evaluation of criminal responsibility and by urgency for treatment (if the prison sentence is combined with a (TBS) measure). However, severity of the crime and societal expectations about punishment are also important factors in these decisions and can negate mitigation (cf. Claessen & De Vocht, 2012). Certain disorders (i.e. substance abuse) can complicate decisions about criminal responsibility even further. Whether such disorders can affect criminal responsibility is sometimes viewed differently between the disciplines of criminal law and forensic psychiatry. Independent of the conclusions in the FMHR, a number of judges mentioned that they evaluate themselves whether the alleged criminal behavior is compatible with the diagnosed disorder to determine the degree of criminal responsibility. Such remarks illustrate the autonomy of judges in relation to the expert advice.

Other discrepancies between the two disciplines that were highlighted in the discussions, relate to the scale of criminal responsibility. While there is no legal or empirical support for either the three or five degrees scales (Dal-

huisen, 2013), judges prefer the five degrees to three degrees in practice because it provides more insight in the extent to which a prison sentence should potentially be mitigated. Yet the Dutch Society of Psychiatry recommends the use of three degrees in their guidelines, because these five degrees wrongfully implied scientific accuracy (Hummelen & Aben, 2015).<sup>3</sup> The rationale behind the use of three degrees is that it would improve the inter-rater reliability between experts in their conclusions about criminal responsibility (Hummelen, 2021). However, judges argue that this forces them to rely more on their discretionary power than they would like. The different perspectives on a number of important issues by the disciplines of criminal law and forensic psychiatry requires further dialogue and communication. Such communication can be optimized when experts are summoned to testify in court more often than is currently practiced or desired, since participants unanimously expressed the value of expert testimony.

All in all, the results in the current study provide a first insight in the judicial decision-making process about guilt and sentencing in cases with an FMHR. While this is a study in the Dutch legal context, it does provide a more general understanding of factors related to the use of forensic mental health information which are considered important in judicial decisions, such as criminal responsibility and recidivism risk. The Dutch legal context forms an especially interesting case because Dutch professional judges have a lot of discretionary power, especially related to defendants with mental health problems. Therefore, this study illustrates how aspects of forensic mental health expertise contribute to decisions-making when this is less formalized by law (compared to the jurisdictions in which certain disorders are prohibited from affecting sentencing decisions or in which a trial is bifurcated). Given the (international) prevalence of mental illness in the criminal justice system (Dirkzwager et al., 2021; Dorn et al., 2014; Favril & Dirkzwager, 2019; Fazel & Danesh, 2002; Fazel et al., 2016), this study may serve as encouragement to further study judicial decision-making regarding defendants with mental health problems, both in the Netherlands and in other jurisdictions.

#### 5.4.1 Limitations

The current study has some limitations. First, the analyses are confined to judges who actively chose to participate in this study. Many of the participants had (prior) experience with respect to the field of forensic psychiatry. While

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3 In the most recent published guideline (April 2022) from the Dutch Institute of Forensic Psychiatry and Psychology, psychologists are permitted to explicate their conclusions about criminal responsibility using the five degrees despite the recommended three degrees in the standard questions format (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022).

these experiences made them more knowledgeable and critical about the use of FMHRs in general, this potential selection effect affects the interpretation of the findings. Although the sample size was limited due to difficulty in approaching and obtaining sufficient participants, the data reached saturation. Notwithstanding these limitations, sufficient heterogeneity of experiences and attitudes within and between focus groups enriched and deepened the discussions.

Second, as is the case with most (qualitative) research, the discussions may have suffered from response bias by social desirability, especially when discussing more controversial topics such as unintended effects of FMHRs in decision-making. While such bias can never be fully eliminated, the variability in answers, critical notes, and detail of answers within and between groups, combined with rich examples from practice, provided an indication that participants were not inclined to respond in a socially desirable way (Bergen & Labonté, 2020).

A third limitation concerns the online setting in which the focus groups took place. A general limitation associated with web-conference, synchronous focus groups is lack of non-verbal cues and communication (Collard & Van Teijlingen, 2016; Steenhout, 2021; Tates, 2010). The use of webcam technology partially reduced this limitation by showing participants' face and upper body. This allowed non-verbal communication through facial expressions (Tuttas, 2015). Another limitation of web-conference focus groups is potential lack of attention or engagement due to environmental distractors at the location from which the respondents participate in the research (usually from home). Remote participation in a group interview may enhance distancing from the discussion (Tuttas, 2015). Despite these potential problems associated with the virtual setting, the respondents were attentive and engaged in the discussion with similar participation of each respondent. They were all involved in the discussion, interacted with each other and their non-verbal attitudes indicated they were listening attentively. The use of web-conference focus groups provides a flexible and cost-efficient method to conduct research among a geographically distributed and occupied population. Moreover, prior research comparing quality of online focus groups with face-to-face focus groups did not find meaningful differences in data quality (i.e. Kite & Phongsavan, 2017; Menary et al., 2021; Reid & Reid, 2005; Tates, 2010; Woodyatt et al., 2016).

#### 5.4.2 Recommendations for future research

While the current study used professional judges as a sample, prior (international) research mostly made use of convenience samples (e.g. students) to study judicial decision-making (see the review in Chapter 2), even though sentencing decisions are commonly made by judges. Therefore, more systematic and (internationally) comparative research among this population is necessary

to expand our knowledge about factors that contribute to judicial decision-making in cases with an FMHR.

Recent legal developments in the Dutch forensic psychiatry field, such as the implementation of the Forensic Care Act and Compulsory Mental Health Care Act, changed sanction options significantly (i.e. the introduction of the care authorization<sup>4</sup> that can be imposed throughout multiple stages in the criminal procedure). These sanction options may require a different decision-making process because other legal professionals are involved. For example, the prosecutor has an important role in decisions regarding care authorization. The current study showed that the involvement and interaction with other criminal justice actors in judicial decision-making is not always optimal. Therefore, future research should explore such interactions even further and include other decision-making processes during the criminal justice procedure.

Another complex and prominent issue revolves around the high number of defendants who refuse cooperation with a forensic mental health evaluation to avoid a TBS measure (see Nagtegaal et al., 2018). This subject remained relatively unexplored in the current study. When a defendant is uncooperative, it is difficult for experts to adequately inform judges about mental health problems, criminal responsibility, and risk. Yet information needs concerning these uncooperative defendants are similar to cooperative defendants (cf. Nagtegaal et al., 2018). Recent initiatives have been introduced to gain more information about the mental health problems of offenders. These include a special ward to observe the behavior of uncooperative defendants more elaborately, and expansion of legal authority to receive medical information without the defendants' consent (Nagtegaal et al., 2018; section 37a sub 6-9 CC). Future research should explore whether these initiatives supply the amount of information necessary for judges to make adequate decisions about sanctions in such cases.

### 5.4.3 Conclusion

The current study provides a first qualitative understanding of the decision-making process about guilt and sentencing in the Netherlands when an FMHR is involved. While further (comparative) research is essential, this study shows that judges value expert information about the mental health of the defendant to evaluate the criminal responsibility and dangerousness in order to impose appropriate sanctions. Despite the reliance on conclusions of the experts, judges do critically assess the information in the report and the expert's professional

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4 Until January 1<sup>st</sup> 2020, when a defendant was considered not criminally responsible (insanity), they could also be placed in a psychiatric hospital. From 2020 onwards, this measure has been replaced by the civil measure of a care authorization (section 2.3 Forensic Care act) to divert these defendants out of the criminal justice system and into psychiatric care.

experience. Cooperation between criminal law and forensic psychiatry also results in diverging perspectives on issues about mental disorder, principles of criminal responsibility, dangerousness, and treatment. More communication and education within and between the two disciplines will benefit both the forensic mental health evaluation and the understanding and use of this expertise in criminal law. This will further improve legitimacy and equality of decisions in severe cases which frequently generate a lot of public and political attention.

